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No. 00-387

IN THE

Supreme Court of the United States

GERBER PRODUCTS COMPANY,

Petitioner,

v.

PAMELA G. TYLKA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER AND BRIEF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Chamber of Commerce of The United States of America ("Chamber") and the American Chemistry Council ("Council") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file a brief *Amici Curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Amici* are filing this motion because Respondents have declined to consent to this brief being filed. A copy of the proposed brief is attached.

As more fully explained at page 1 of the attached brief under "Interest of the *Amici Curiae*", the Chamber and the Council are organizations representing business corporations and associations throughout the United States. The members of the Chamber and the Council will suffer the effects of the decision of the Seventh Circuit in this case if it is permitted to stand, because they are routinely made defendants in class actions filed in state courts throughout the country, and often seek to remove those cases to federal court.

Amici believes that their brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely positioned to point out: (1) that business corporations in this country need to have certainty about the standards governing removal of cases from state court; (2) that the Seventh Circuit's decision poses a significant threat that businesses will be exposed to wasteful litigation; and (3) that it is important to business that the question concerning the scope of 28 U.S.C. § 1367 be resolved.

Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief *Amici Curiae*.

Respectfully submitted,

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I

INTEREST OF THE AMICI CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest federation of business companies and associations. The Chamber represents a membership of more than three million business and professional organizations from around the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The American Chemistry Council, (formerly, the Chemical Manufacturers Association) ("Council") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $435 billion dollar enterprise and a key element of the nation's economy. One of the functions of the Council is to file *amicus curiae* briefs in cases involving issues of importance to its members.

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1. Pursuant to Rule 37.6 *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. Petitioner has consented to the filing of this brief, but Respondents have not.

Members of the Chamber and the Council have been subjected to significant numbers of abusive class actions and other lawsuits filed in state courts on a regular basis. It has been the experience of the members that they are more likely to be afforded a full and fair hearing, and to be protected from abusive claims, particularly in the class action context, when those claims can be heard in federal court. For this reason, it is of critical importance to the members of the Chamber and the Council, and to American business, that they be permitted to invoke federal jurisdiction through removal whenever the statutory requirements for removal jurisdiction are met. Because the Petition in this case presents two important questions that bear on the rights of defendants to remove cases to federal court, the Chamber and the Council urge the Court to grant the Petition.

REASONS FOR GRANTING THE WRIT

Defendants hailed into court in a foreign state, and especially corporations sued in class actions in those states, have a legitimate interest in seeking to invoke the jurisdiction of the federal courts whenever that jurisdiction is available. The statutory provisions, governing rules and decided case law are rigorous and combine to make removal a difficult undertaking, but not to render it impossible. The governing standards allow a party seeking removal to know what it must do, how it must do it and when. The decision by the Seventh Circuit in this case takes away that certainty and erects nearly insurmountable obstacles on the basis of a clearly erroneous view of the requirements for removal.

The decision of the Seventh Circuit in this case has another pernicious effect. This case was litigated vigorously for four years and decided on the merits. The record amply

demonstrates that the District Court had subject matter jurisdiction. Nevertheless, through the mechanistic application of an erroneous finding that the removal was procedurally flawed, the Seventh Circuit ordered that the time, effort and expense borne by the District Court and the parties be disregarded and the case sent back to state court to start all over again. The Seventh Circuit's decision presents the threat that similar senseless waste will be imposed in numerous other cases.

Finally, this case affords the Court with an opportunity to decide whether 28 U.S.C. § 1367 authorizes the district courts, in adjudicating class actions based on diversity of citizenship, to exercise supplemental jurisdiction over the claims of absent class members that individually do not satisfy the jurisdictional minimum amount set by 28 U.S.C. § 1332, if the representative plaintiff's claim meets that amount. The Court sought to answer that question last term in *Free v. Abbott Laboratories, Inc.* 529 U.S. __, 120 S. Ct. 1578 (2000), in which the Court affirmed by an equally divided Court. For the reasons that led the Court to grant *certiorari* in *Free*, this Court should consider and decide that question in this case.

I. THE SEVENTH CIRCUIT'S ERRONEOUS DECISION PLACES IMPOSSIBLE BURDENS ON LITIGANTS SEEKING TO INVOKE FEDERAL COURT JURISDICTION

In ruling that Petitioner had not removed this case properly, and that as a consequence the case must be remanded to state court, the Seventh Circuit got it wrong and got it wrong in several important ways. Those points are covered cogently and comprehensively in the Petition filed by Gerber Products Company and will not be repeated

here. What the Chamber and the Council want to bring to the Court's attention is why this erroneous ruling poses a significant threat to their members and others in the American business community.

It is of critical importance to the American business community that businesses be permitted to avail themselves of the removal procedures prescribed by the relevant provisions of the United States Code, the Federal Rules of Civil Procedure and the decisions of this Court and the lower federal courts. From the earliest days, it has been recognized by this Court that the purpose of creating diversity jurisdiction in the federal courts was to protect a citizen of one state sued in the courts of another state from the actual and perceived unfairness to which such a defendant might be subjected. *See Bank of The United States v. Deveaux*, 9 U.S. (5 *Cranch*) 61, 87 (1809) (*Marshall,* C.J.). The passage of time has not lessened the need for such protection; indeed, in some respects the need has increased. Particularly in the context of so called "national class actions", and in consumer class actions like this case, corporate defendants have a real and legitimate interest in seeking the procedural safeguards and even-handedness provided by the federal court forum, but all too often not available in state courts.

The threatened harm to businesses caused by the Seventh Circuit's ruling has two distinct but related aspects. First, of course, is the simple threat that an out-of-state business entitled to remove a case will nonetheless be subject to the risk of local bias. The second threat may not be as evident but may be even more serious. It is often the case that state procedural rules simply do not provide the same safeguards as do the Federal Rules, especially in class actions.

The following discussion of some of the serious issues raised by class actions is not meant to comment on the appropriateness of class certification in this case, and is not included because those concerns about class actions are directly at issue in this case. Rather, the discussion is intended to illustrate why it is so important to the members of the Chamber and the Council that they not be deprived of their rights to remove state court cases, especially class actions, to the federal courts when the jurisdictional requirements are met.

There has been a growing recognition in the federal appellate courts, and in this Court, of some of the dangers posed by class action suits and the concomitant need to examine rigorously the propriety of certifying a class and to apply scrupulously the safeguards provided by Rule 23. Ironically, the Seventh Circuit has been in the forefront of this salutary trend.

One of the seminal decisions in this area is Chief Judge Posner's opinion in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995). The Seventh Circuit granted the extraordinary relief of *mandamus*, ordering the district court to decertify a class because the challenged order of class certification would cause irreparable harm to the defendants, and because the district court's order was "usurpative". At issue in *Rhone-Poulenc* was an order that certified a class of hemophiliacs infected by the AIDS virus through exposure to contaminated blood products. Prior to the Seventh Circuit's decision, thirteen other cases seeking to impose tort liability on manufacturers for the transmission of HIV to hemophiliacs had been tried in various courts around the country and the defendants had won twelve of them. Chief Judge Posner pointed out the enormous risk faced by

defendants in cases of this sort where a class is certified, and the fact that certification itself often forces significant settlements despite a lack of validity to the plaintiffs' claim:

> But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. (citations omitted.) If they settle, the class certification — the ruling that will have forced them to settle — will never be reviewed. (citations omitted.) Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements" (citations omitted.) Judicial concern about them is legitimate, not "sociological" as it was derisively termed in *In re Sugar Antitrust Litigation*, 559 F. 2d. 481, 483, n.1 (9th Cir. 1977). 51 F. 3d. at 1298-1299.

More recently, in *Blair v. Equifax Check Services, Inc.*, 181 F. 3d. 832 (7th Cir. 1999), Judge Easterbrook expressed similar concerns:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. (Citing *Rhone-Poulenc, supra*) 181 F. 3d. at 834.

The Seventh Circuit has not been alone in this concern. In *Castano v. American Tobacco Company*, 84 F.3d 734, 746 (5th Cir. 1996), the Fifth Circuit stated:

> In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens a number of unmeritorious claims. (cite omitted.)

Federal courts reviewing class certifications have pointed to the difficulties presented when a single court is asked to apply the law of multiple jurisdictions, or else to create a "hybrid" of the law of negligence, strict liability, etc. The courts in *Rhone-Poulenc* and *Castano* noted that these difficulties alone militated against certifying such class actions; Judge Posner noted the danger that such a situation would eventuate in "a single jury instructed in accordance with no actual law of any jurisdiction — a jury that will receive a kind of Esperanto instruction, merging the negligence standards of the fifty states and the District of Columbia," 51 F.3d at 1300. The Sixth Circuit in *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996) granted a writ of mandamus and ordered that the district court decertify a class, noting that "if more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be appropriate course of action," *Id.* at 1085.

In *Amchem Product, Inc. v. Windsor*, 521 U.S. 591 (1997), this Court affirmed a Third Circuit decision striking down a $1.3 billion class settlement of future asbestos claims. The Court expressed serious reservations about the use of

class actions in mass tort cases, emphasizing the fact that differences in state law compounded the disparities among putative class members. Referring to the 1966 Notes of the Rules Advisory Committee questioning the wisdom of the use of the class action mechanism in such cases, the Court stated that "the Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members are great," *Id.* at 625.

None of this is intended to argue or advance the proposition that class actions are inappropriate or always without merit. In fact, Judge Posner explicitly noted in *Rhone-Poulenc*:

> We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. *We have yet to consider the balance.* (emphasis added).

51 F.3d 1293, 1299.

That is precisely the point as to why the Seventh Circuit's action in denying Gerber's right to remove this case is so harmful. This Court in *Amchem Products,* the Seventh Circuit in *Rhone-Poulenc* and *Blair*, the Fifth Circuit in *Castano*, the Sixth Circuit in *American Medical Systems*, and numerous other federal courts routinely engage in that balancing and that scrutiny to determine whether or not the use of a class action is appropriate. The federal courts weigh the claimed justifications for and benefits of class treatment,

against the disparities, deficiencies and inequities that class treatment might provide. Unfortunately, the same protections and the same rigorous scrutiny are often lacking in some state courts, and that is why the ability to remove cases, in appropriate circumstances, is so important to America's business community.[2]

Corporate defendants' experience in state court class actions is often strikingly different from what is experienced in federal courts. To be sure, many state courts and state court systems make significant efforts to provide the same types of procedural safeguards to parties in class actions. It is no secret, however, that certain state court systems, and particular counties within those states, have been identified

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2. Significantly, the federal system has recently made interlocutory appellate review even more readily available in the context of class action determinations. Other than *Blair*, each of the cases discussed above (*Amchem, Rhone-Poulenc, Castano* and *American Medical Systems*) obtained appellate review only through a writ of mandamus in the Courts of Appeals. Obviously, only the extraordinary case gets the benefit of the issuance of a writ of mandamus. By amendment which took effect on December 1, 1998, however, FRCP Rule 23(f) was added to the class action rule, to permit a Court of Appeals in its discretion to hear an appeal from an order of a district court granting or denying class certification. As Judge Easterbrook noted in *Blair*:

> [W]hen the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order. 185 F.3d at 835.

Most often, interlocutory review of class certification orders is not available in state court. *See*, for example, 75 ILCS 5/2-801, *et seq.* (Illinois.)

as hospitable, welcoming hunting grounds for plaintiffs' lawyers eager to file consumer and mass tort class actions. *See*, for example, the report of the RAND Institute for Civil Justice, *Class Action Dilemmas,* Executive Summary p.7 (1999). The Wall Street Journal has reported that plaintiffs' class action lawyers seek out rural courts in Louisiana, Tennessee, Alabama and elsewhere, filing a disproportionate number of class actions in courts perceived to be friendly to plaintiffs and hostile to the business community. Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall Street Journal, October 10, 1996 at B.1.

Illinois has recently emerged as one of the most popular states for the filing of consumer class actions, especially in two southern Illinois counties. This comes in the wake of one Illinois court's decision to certify a class action encompassing 4.7 million members located in 48 different states. *Avery v. State Farm Mutual Auto Ins. Co.*, No. 97-L-114 (currently on appeal to Illinois Appellate Court, Fifth District.) The court certified the class despite the fact that two federal courts and one state court in another Illinois county had earlier refused to certify similar classes. *See Moorhead v. State Farm Mutual Auto Insurance Company*, No. 95-AR-0668-S (N.D. Ala. September 12, 1997); *Murray v. State Farm Mutual Auto Insurance Company*, No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Insurance Company*, No. 94 CH11396 (Cook County Cir. Ct. Jan. 27, 1998). In a series of rulings that essentially ignored the very real concerns addressed by the federal courts in the cases discussed above, the trial court eventually upheld class certification and conducted a trial that resulted in enormous damages. Not surprisingly, since then numerous class actions have been brought in two

counties in this part of Illinois, purporting to be on behalf of multi-state classes and often against out-of-state defendants.[3]

What does all of this say about the Seventh Circuit's decision in *Tylka v. Gerber Products Company*? More to the point, what does the Seventh Circuit's decision say about the very real concerns presented by class actions? What it says is that corporate defendants can be forced to face the very serious hazards described by the Seventh Circuit itself in *Rhone-Poulenc* and *Blair*, by the Fifth Circuit in *Castano* and by the Sixth Circuit in *American Medical Systems*, without any of the protections and rigorous scrutiny afforded by the federal courts and by the Federal Rules of Civil Procedure.

The decision also means that a defendant seeking to obtain those safeguards may find itself precluded from doing so, no matter how carefully it proceeds. In this case:

- *Gerber alleged in its removal papers that each of the plaintiffs was a citizen of Illinois, that Gerber was a citizen of Michigan, and that complete diversity of citizenship existed.*

- *The District Court found that diversity of citizenship existed.*

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3. For a description of the class certification phase of this case, *see* Petition for Writ of Certiorari, No. 97-2063, *State Farm Mutual Insurance Company v. Speroni*, (filed June 22, 1998). For a more complete description of the history of class action filings in these Illinois venues in the last two years, see Brief for the Chamber of Commerce of the United States of America and the Chemical Manufacturers Association, filed as Amicus Curiae in *Free v. Abbott Laboratories*, No. 99-391, February 11, 2000.

- *The plaintiffs admitted in submissions to the District Court and to the Seventh Circuit that they were citizens of Illinois and that diversity of citizenship existed.*

- *The fact of the plaintiffs' citizenship was established at deposition.*

All of this was made known to the Seventh Circuit, and still it was not enough. If for some reason the Seventh Circuit was still not satisfied, it could have sent the case back to the district court to confirm that these jurisdictional facts had been established. It did not do so. Instead, the Seventh Circuit decided after four years of litigation and judgment on the merits that the entire proceedings were for naught, because notices of removal filed four years earlier somehow did not contain as yet unspecified magic words.

This result means that, like Gerber, any corporate defendant sued in a foreign state, with complete diversity, and with all of the other prerequisites for federal court jurisdiction present, might nonetheless be forced to litigate in hostile state courts. It would be bad enough if this were an isolated incident, but it does not stop there. On June 22 of this year, the Seventh Circuit issued an order in *Razdan v. General Motors Corporation*, No. 99-3012. Like this case, *Razdan* was filed in state court and removed to the United States District Court for the Northern District of Illinois on the basis of diversity of citizenship. Like this case, *Razdan* was litigated on the merits, and defendant obtained summary judgment. The Seventh Circuit's June 22, 2000 order reads, in full, as follows:

> This case was removed to the federal district court on the basis of diversity of citizenship. See 28 U.S.C. § 1441(a). The court has reviewed

> the record and discovered a problem with subject matter jurisdiction. Although the defendant's notice of removal states that the plaintiff is a citizen of the State of Illinois, the plaintiff's complaint alleges that he is a resident of Illinois. The record does not reveal whether diversity of citizenship existed at the time of removal. Accordingly, the court, on its own motion, will allow counsel for the parties 10 days to amend their pleadings to establish the basis for federal diversity jurisdiction. See 28 U.S.C. §1653, *Tylka v. Gerber Products Co.*, 211 F.3d 445, 447 (7th Cir. 2000). The parties' submissions must be filed by July 7, 2000, or the judgment of the district court will be vacated and the case remanded to the district court with instructions to remand the case to the state court.

This is extraordinary. The requirements of 28 U.S.C. § 1446(a) appear to be clear enough: any defendant wishing to remove a case to federal court is required to file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal . . ." Of course, pursuant to 28 U.S.C. § 1446(b), that notice of removal must be filed within thirty days of service of the complaint. Despite the fact that defendant's notice of removal in *Razdan* states that the ground for removal was that plaintiff was a citizen of the State of Illinois, the Seventh Circuit found this inadequate because *plaintiff's complaint* alleged that he was a resident of Illinois. The court went on to threaten that, as in this case, years of litigation effort and a judgment on the merits would be tossed out the window unless the parties could submit some unspecified, additional information "to establish the basis for federal diversity jurisdiction."

As noted in the Petition (p. 12-17), both Rule 8(a)(1) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1446 make it plain that "notice pleading" is all that is required for removal. As Petitioner also points out, "federal law presumes that an individual's residence is also his domicile." (Petition, at 16 and cases cited therein.) In short, the statute and rules do not require, and the realities of litigation do not permit a defendant seeking to remove a case to do more in the way of giving a "short and plain statement of the grounds for removal" than was done by Gerber here, or by General Motors in *Razdan*. Almost inevitably, in state court filings, a plaintiff identifies his or her place of residence, not citizenship. But given the fact that residence, domicile and citizenship are, in most cases, the same, it is entirely consistent with the obligations of Rule 11 and the requirements of § 1446(a) for a defendant advised of a plaintiff's residence, and required to file a notice of removal within thirty days of service of the complaint before any discovery is likely to have taken place, to assert in good faith that plaintiff is a citizen of the state in which he or she resides. And, as noted in the Petition, courts have routinely taken such averments of diversity at face value and found them acceptable. *See* Petition at page 15.

The Seventh Circuit's decision in this case is very instructive for the plaintiffs' class action bar. It tells them that if they want to stay in state court, and if they want to avoid the careful scrutiny brought to bear on class actions by the federal courts, they should carefully avoid any reference to citizenship in the allegations of their complaint. It also instructs them that they ought to use any available procedural mechanism to avoid providing discovery in the first thirty days following service of the complaint.

And what does the decision here tell defendants like Gerber or any other business entity sued in state court? It tells them that, at least if they are in the Seventh Circuit, they may be deprived of their right to litigate claims in federal court even when there is diversity of citizenship, and subject matter jurisdiction, and a timely filed notice of removal. It tells them that they can try to remove a case, and litigate it to a conclusion, and perhaps prevail on the merits, and have that taken away from them.

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), this Court looked at another removal issue, viz., when the thirty day period for filing a notice of removal begins to run under 28 U.S.C. § 1446(b). The Court rejected any interpretation of the removal statute and the Federal Rules that would permit a plaintiff to "trap foreign opponents into keeping their suits in state courts." *Id.* It also rejected any interpretation of the removal statute that would permit a party's procedural rights to "slip away". *Id.* But that is exactly what would eventuate if the Seventh Circuit's decision is left undisturbed. The Court should grant the Petition to make clear that defendants seeking removal will not have to suffer the dire consequences wrought by the Seventh Circuit's decision.

II. TO SEND THIS CASE BACK TO STATE COURT WOULD BE A MISCARRIAGE OF JUSTICE

Petitioner forcefully and persuasively explains how the decision of the Seventh Circuit in this case is in direct conflict with and defies a recent decision of this court, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). *See*, Petition pp. 22-26. Nothing needs to be added to that discussion, except to note that the Chamber and the Council agree that the ruling in *Caterpillar* requires that the Seventh Circuit decision in this case be

summarily reversed. The Chamber and the Council do wish to comment briefly, however, on the devastating effect that a decision such as that rendered by the Seventh Circuit in this case, and rejected by *Caterpillar,* can have on their members.

What happened here should not be allowed. Both Petitioner and Respondents spent four years, countless hours, substantial effort and, no doubt, staggering amounts of money in litigating this case. Issue was joined, discovery was completed, motions were filed, briefed, and decided; at the end of the day, the district court decided the case on its merits. There was no finding by the Seventh Circuit that the district court lacked subject matter jurisdiction. There was no finding of some fundamental flaw in the proceedings. There was only the erroneous determination that there was a mechanical flaw in an early procedural filing. On that flimsy basis, all of that time, all of that effort, all of that money and, worst of all, all of that expenditure of judicial resources were rendered meaningless. As if that were not bad enough, if the Seventh Circuit's decision stands, *all of that has to be done again in the state court, from scratch.*

Nor is such folly limited to this case. The Seventh Circuit has threatened to do the very same thing in *Razdan v. General Motors, supra* — another case fully litigated and decided on the merits. How many other cases, how many other parties face the possibility of such an insidious result if the Seventh Circuit's decision here stands? According to statistics compiled by the Administrative Office of the U.S. Courts, approximately 175,000 cases were removed from state courts to United States district courts between 1994 and 1998, the most recent statistics available. In 1996 alone, the year in which *Tylka* was filed, some 40,593 cases were removed. *See* Administrative Office of the U.S. Courts, *Judicial Business Of The United States Courts*, 1999, Table S-7.

It is not unreasonable to assume that many of those cases are still being litigated, and that some have been decided on the merits and are now awaiting appellate review. It is also not unreasonable to assume that, in many of those 175,000 cases, the "short and plain statement" of the grounds for removal contained language very similar to that included in the notices of removal filed by Petitioner in this case. If even a small fraction of those cases face the prospect of receiving the same "justice" meted out by the Seventh Circuit in this case, the result will be intolerable. Such a result would do more than defy the ruling of this Court in *Caterpillar*; it would defy common sense. The Chamber and the Council urge this Court to grant *certiorari* to set aside the Seventh Circuit's ruling.

III. THE ISSUE CONCERNING THE SCOPE OF SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367 NEEDS TO BE RESOLVED, AND THIS CASE PRESENTS AN APPROPRIATE VEHICLE BY WHICH TO RESOLVE IT

The Chamber and the Council and their members have a strong interest in having the Court resolve the question presented last term in *Free v. Abbott Laboratories, Inc.*, No. 99-391. In that case, the Court attempted to answer whether 28 U.S.C. § 1367 authorizes the district courts, in adjudicating class actions based on diversity of citizenship, to exercise supplemental jurisdiction over the claims of absent class members that individually do not satisfy the jurisdictional minimums. Because the Court split four to four on the questions presented in *Free*, with one Justice not participating, the question was left unanswered. This case presents the question squarely and cleanly, since this juridictional minimums issue, and not diversity of

citizenship, was the basis of respondents' appeal. Because the Court should in any event grant *certiorari* to address the other issues discussed above, the Court can and should resolve this question as well.

The Chamber and the Council (then known as the Chemical Manufacturers Association) filed a brief as *amici curiae* in *Free v. Abbott Laboratories*, and the Chamber and the Council stand by all of the arguments set forth therein. The members of the Chamber and of the Council have a strong interest in having this question resolved for many of the same reasons discussed above in connection with the issues concerning the adequacy of the notice of removal. The same underlying question — whether defendants will be able to avail themselves of the benefits of federal court jurisdiction in class actions — is implicated here. The Chamber and the Council believe that the plain language of 28 U.S.C. § 1367 authorizes the federal district courts to exercise supplemental jurisdiction over absent class members, regardless of the amounts of their claims, so long as the court has original jurisdiction over the claims of the representative class members. There is a split in the Circuits on that issue, however, and its resolution is clearly of substantial importance, as the Court recognized in granting *certiorari* in *Free v. Abbott Laboratories*. Accordingly, the Court should again take up that question as it is presented in this case.

CONCLUSION

The questions presented by the Petition for Writ of Certiorari are questions of great importance to the American business community. *Amici curiae* the Chamber of Commerce of The United States of America and the American Chemistry Council urge the Court to grant the Petition and to set the case for briefing and argument.

Respectfully submitted,

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